

Why can't we all be civil?

Sanctions are a judge's last resort, so why not try a little civility first?

By Donna Bader

California Rules of Court, rule 8.1105(c), sets forth the standards for publishing an opinion, most of which can be categorized as expanding on the rules of law. But sometimes the Court of Appeal wants to say something to us lawyers that, while it doesn't officially fit the parameters of a rule of law, provides "guidance" to legal practitioners. Or perhaps the court is just in the mood for a good scolding.

The recent decision in *Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal.App.4th 708 provided Justice Bedsworth of the Court of Appeal in Fourth Appellate District, Division Three with a forum for giving a good old-fashioned lecture on civility to, well, just about everyone, except perhaps for the actual litigants.

Officially, the case dealt with the trial court's authority to award sanctions under Code of Civil Procedure section 128.7 on its own motion. But rather than keeping those sanctions for the superior court, it ordered the sanctions to be paid to the opposing side, which hadn't even asked for them, in the amount of $5,076.16. If only Santa Claus were so generous! We can't even get that much on a typical day even if our opponent misses a deposition, refuses to answer interrogatories, or engages in all sorts of discovery abuses.

Apparently the trial court was "understandably chagrinned by the rather dilatory pace at which the case was being prosecuted" and imposed sanctions under section 128.7 by its own motion. (*Id.* at p. 710.) Just like that! The appellate court was obviously *chagrinned* by the trial court's actions, finding it turned to sanctions "too quickly," resulting in three different errors:

> Sanctions are a judge's last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel with the fact we hold the high ground: the literal high ground of the bench and the figurative high ground of the state's authority. We do not like to admit failure so we sanction reluctantly.
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> But sanctions can level the playing field. If we do not take action against parties and attorneys who do not follow the rules, we handicap those who do. If we ignore transgressions, we encourage transgressors. So sanctions serve a purpose other than punishment. If we cannot convince attorneys to conduct themselves honorably and ethically by appealing to their character, we can sometimes bring them into line by convincing them that obeying the rules is the route of least resistance – the less expensive alternative.

(*Id.* at p. 710.)

Background

Let's digress and get a bit of background: In July 2011 the plaintiff, Interstate Specialty Marketing, Inc., filed a verified complaint for breach of contract against ICRA Sapphire. The plaintiff alleged it had contracted with Sapphire to convert a computer software application from DOS to a format supportable by Microsoft. Five years later, Sapphire had yet to complete the conversion.

The complaint averred that Exhibit A, a letter dated November 2002, was a true and correct copy of the agreement. Plaintiff's counsel had searched for a copy of the agreement, but upon not finding a signed version (which had either been lost or not given to Interstate), its attorneys attached the letter, believing it to be the agreement. (Hey, guys, that is one good use of the forgiving phrase "informed and believe." Maybe they didn't want to admit their doubt or that they lacked a signed copy of the agreement.)

Isn't that what discovery is for? You can ask the other side for documents in a scattergun approach without admitting

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ignorance and see what you come up with. But plaintiff's attorneys did not even have to go that far because Sapphire had a true and correct copy of the signed agreement and attached it to its cross-complaint. Perhaps plaintiff's attorneys were buried under a mountain of work and failed to notice the difference between the two documents.

Then in requests for admission, the defendant asked the plaintiff to admit its Exhibit A was not the operative contract or the "final expression of the parties." Interstate admitted as much, and Sapphire even took the next step and responded to discovery, denying Exhibit A was the operative contract. So, if the plaintiff's attorney missed the correct agreement attached to the complaint, there were two more opportunities to find the error.

What didn't happen was that the defendant's attorneys called the error to the attention of plaintiff's attorneys and asked for an amended complaint. But life is not always easy, so we proceed along the path of complicating a pretty simple breach-of-contract action.

Sapphire jumped on the opportunity to win by a technical knockout and filed a motion for summary judgment based solely on the argument (that) plaintiff could not prevail on a contract, which it admitted was not the final expression of the contract between the parties.

The wake-up call to plaintiff

That motion served a wake-up call to plaintiff's attorney, who then brought an ex parte application to amend the complaint, which was first scheduled three weeks before the hearing date on the summary judgment motion. Two days later, the judge took the ex parte motion under submission and decided he would rule on it at the same time he ruled on the motion for summary judgment. That meant that no one knew whether the trial court would allow plaintiff to fix its error until the very date it was ruling on a motion designed to end the litigation based on the unfixed error.

On the date of the hearing, the trial court denied the motion and granted the ex parte application to amend the complaint, saving plaintiff's attorneys many sleepless nights and essentially saving the case from ending right there. The court further noted that the Exhibit A and real contract were similar and Sapphire failed to note any material differences in the two.

The trial court then set an order to show cause "re: Dismissal are Sanctions" against plaintiff and its attorneys because it had attached the wrong agreement to the complaint. Defendant's attorney noted how long it had taken plaintiff to fix its error; meanwhile, it had incurred $5,076.16 in fees for the failed motion for summary judgment.

The trial court then avoided the 21-day safe harbor provision in Code of Civil Procedure section 128.7 by finding the time began to run when the motion for summary judgment was filed. That meant plaintiff's attorney took two months before seeking an amendment.

In assessing sanctions, the trial court stated, "I'm not looking for a pound of flesh here. This isn't sanctions for the sake of sanctions. If I was doing that I'd be happy to help rectify the court's budget problems by sanctioning you in the extreme." (*Id.* at p. 713, fn. 7.) On the contrary, the court considered the award a "cost allocation" because the defendant's attorneys had to go to all of that hard work to file a motion that could have been avoided had anyone actually bothered to *communicate*. And I am sure that the plaintiff was relieved to know it was not really being sanctioned but allocating costs.

A good lecture always requires a reference to Shakespeare and both the lower court and the appellate court seized the opportunity to rely on the master playwright, who had the good sense to stay in the theatre and avoid the courtroom:

> The trial judge prefaced his decision to impose sanctions on Interstate and its counsel (and under these facts, we assume the brunt would be borne by counsel) with a reference to Shakespeare – Shylock's collateral in Merchant of Venice. He might well have chosen a different Shakespeare play and allusion – to the plague deserved by two warring houses each of which has caused unnecessary bloodletting. Both sides here could have done better.

(*Id.* at p. 714.)

Despite its criticism of what the lower court did, the appellate court acknowledged the judge had "good reason to be chagrined by the conduct of [plaintiff's] counsel, . . ." (*Id.* at p. 714.) Plaintiff's attorneys had been inattentive and when the facts or correct exhibit was presented to them, they moved slower than molasses in fixing the problem, resulting in a lot of work and unnecessary hearings for everyone.

Defendant's attorneys did not escape criticism because the attorney would most certainly know and cherish our state's public policy of disposing of cases on their merits, which don't typically include winning because the plaintiff's attorney attached the wrong exhibit to a complaint. The court observed that defendant's attorneys could have telephoned or written about the error, and then brought the motion if plaintiff's attorney refused to take steps to correct the error. "Instead, Sapphire's counsel yielded to the temptation to exploit an adversary's gaffe so as to deny him a hearing on the merits." (*Id.* at p. 715.) Justice Bedsworth characterized the maneuver as "the Vince Lombardi approach to the law." (*Ibid.*)

The appellate court was very clear in its opinion, but it then took the next step of informing the rest of us of how it views such practices:

> Counsel here was not as culpable as counsel in *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, but he did evidence a disturbing predisposition to pick up the sword before the plowshare. We need to turn away from that kind of practice. 'The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today.' [quoting from *Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17] 'We close this dis-

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cussion with a reminder to counsel – all counsel, regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility . . . Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive.' (*Id.* at p. 715.)

Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267 was heard by the same appellate court and a frustrated Justice Bedsworth wrote the opinion, outlining a "cautionary tale" for plaintiff's attorneys who attempt to seek unearned victory due to a defendant's default. Plaintiff's attorney was also sanctioned pursuant to California Rules of Court, rules 8.63, 8.204(a)(10)(B) and 8.21(b)(3) for virtually copying a brief and request for sanctions filed in an earlier appeal even after seeking an extension of time for complexity, the need for more time to research the issues, and other commitments. (Apparently the trial attorney neglected to change the name of the party from the earlier appeal, providing proof of his propensity to rely on the "cut and paste" method of writing original briefs.)

"The honesty of counsel"

It probably didn't help the attorney's cause in *Kim* when he sent another attorney to the oral argument, one who was unaware sanctions were being considered. Of course, the appellate court responded by issuing a second order to require the trial attorney to personally appear on the sanctions issue.

The court in *Kim* noted how much the courts must be able to rely on the "honesty of counsel." We are, after all, "officers of the court." That title has to mean something, and the court concluded it did, "with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance." (*Id.* at p. 293.)

But unlike *Interstate Specialty Marketing*, the *Kim* case involved an attorney's request for sanctions, used more as a tool for bullying than a legitimate request. Rather than granting the attorney's request for sanctions, the court awarded sanctions *against* the trial attorney in the amount of $10,000 and stated:

> It is difficult for us to express how wrong that is. Sanctions are serious business. They deserve more thought than the choice of a salad dressing. 'I'll have the sanctions, please. No, on second thought, bring me the balsamic; I'm trying to lose a few pounds.' A request for sanctions can *never* be so lightly considered as to be copied word for word from another brief – much less copied in reliance on facts from another case that do not obtain in the present one. A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic.
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> Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.

(*Id.* at p. 293.)

Plaintiff's error in *Interstate Specialty Marketing* was "careless," to be sure, but the error wasn't obviously intentional or malicious nor was it done for an improper purpose. That was one of the factors that saved plaintiff from shelling out a lot of money (if only for the sanction award). Section 128.7(b) lists four types of conduct that will support an award of sanctions and mistake, or even stupidity, is nowhere to be found.

The 21-day safe harbor provision also served as a barrier to an award of sanctions because the appellate court concluded the 21 days runs from the date of service of notice of the OSC hearing, and not the initial filing of the motion for summary judgment, which did not ask for sanctions. It continued, "Nothing in the section would allow for silent running of a safe harbor statute; it is not a safe harbor if there are enemy submarines in it." (*Id.* at p. 716.)

A third error occurred when the trial court awarded sanctions to the defendant. The appellate court concluded that case law does not allow for sanctions awarded on a court's own motion to be made payable to the opponent, citing *Malevec v. Hamrell* (1999) 70 Cal.App.4th 434, 443, 444. Nor could the trial court rely on its common-law authority or inherent power because case law has also held that such a power does not include the power to award attorney fees as a sanction for attorney misconduct in the absence of authority provided in a statute or by agreement of the parties.

The defendant was not without a remedy, however, if plaintiff's verification proved to be false. It could use the verification to impeach the plaintiff or prove perjury had been committed.

The appellate court concluded by awarding *costs* to the defendant, not as a "punishment" but as a "default cost apportionment. But it is impossible to make the order without observing that a phone call alerting opposing counsel to his corrigendum, would have avoided this consequence." (*Id.* at p. 718.)

What is not mentioned here, and is a point of curiosity to me, is whether the attorneys paid for appellate counsel or passed that expense on to their clients. If attorneys rely on time-consuming and expensive scorched-earth tactics, why should the client pay for their lack of civility and cooperation?

In conclusion, I have now passed on this lecture as food for thought for trial attorneys. A little civility would have gone a long way in resolving the problems with plaintiff's complaint and complacency. As I have said many times before, credibility is part of an attorney's reputation that

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should never be traded away in an effort to seek a tactical advantage. In the cases cited above, the attorneys won a small battle during the litigation process, but in the end, may have lost the war, which may be financed by clients who are unaware of the attorney's misbehavior.

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